87-471

Supreme Court, U.S.
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No. 87-

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1987

ROBERT J. HEILGEIST,

*Petitioner,*

v.

SUPREME COURT OF WISCONSIN,

*Respondent.*

*PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN*

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## *QUESTION PRESENTED*

Whether the exercise by the supreme court of a State of extra-territorial discipline of an attorney residing, licensed and practicing law exclusively in a neighboring State, contravenes Art. IV, Sec. 2 and Amend. XIV, Sec. 1, of the Federal Constitution?

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## REFERENCE TO REPORTS

The opinion of the Supreme Court of Wisconsin, not yet reported, is appended hereto as App. I, pp. 1-6. The order of the Supreme Court of Wisconsin dismissing petitioner's motion for reconsideration is appended hereto as App. II.

## JURISDICTION

The judgment of the Supreme Court of Wisconsin was entered June 2, 1987. The order dismissing the motion to reconsider was entered July 29, 1987. This PETITION FOR WRIT OF CERTIORARI was timely filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC §1257(3).

## STATUTORY PROVISION FOR JURISDICTION

62 Stat 929, as amended, 28 USC §1257(3):

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question, or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution treaties or laws of the United States, or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treatires or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c 646, 62 Stat. 929."

## PROVISIONS OF THE FEDERAL CONSTITUTION INVOLVED

Art. IV, Sec. 2 provides:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

Amend. XIV,Sec. 1 provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of...liberty, or property, without due process of law; ...

## STATEMENT OF FACTS

Petitioner, Robert J. Heilgeist, is a citizen of Illinois. He has been licensed to practice law by the Supreme Court of Illinois since 1955. He maintains his principal residence and a law office in Lake County, Illinois, which is adjacent to the State of Wisconsin.

In 1979, petitioner was admitted to practice law in the State of Wisconsin where he also had a summer residence. He practiced in Wisconsin from July 1979 to September 1982.

In that year petitioner moved his residence from Wisconsin, ceased practicing law in that state, and duly notified the Wisconsin Bar authorities accordingly.

In April 1985, one Anthony Wetzel, a Wisconsin resident and his parents (who were erstwhile Wisconsin neighbors of petitioner) consulted Heilgeist at his Lake Villa, Illinois law office concerning a personal injury incurred by Anthony at his high school. The client signed a retainer with petitioner, met with him and conducted all discussions concerning the case in his Illinois law office.

It is undisputed that petitioner informed his client that if any litigation became necessary, it would be conducted by Wisconsin counsel, to whom the case would be forwarded by petitioner. Petitioner wrote a letter to the high school principal, presenting the claim for Anthony's personal

injuries and enclosed a notice of attorney's lien asserted by petitioner in accordance with Illinois law.

An investigation by members of the Wisconsin Board of Attorneys' Professional Responsibility then contacted Anthony Wetzel and his parents. The investigators persuaded the Wetzels to break their retainer agreement with petitioner on the ground that petitioner was "unlawfully practicing law in Wisconsin* and that petitioner could not legally represent Anthony in the personal injury claim.

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*/ The *per curiam* decision of the Supreme Court of Wisconsin,(App. I),recites a history of various disciplinary actions taken by the Wisconsin Court prior to its judgment of June 2, 1987:

--In 1983 petitioner received a "public reprimand" from the Court for having commenced an allegedly "meritless libel and malpractice suit against another attorney" (App. I, 2).

--In 1984, on petitioner's refusal to pay dues to the Wisconsin State Bar Association (in which membership by all Wisconsin law licensees is mandated) or to participate in a so-called "continuing legal education program" the frivolous and useless nature of which is illustrated by a course entitled "Body English In The Selection of Jurors.!

In the instant Wisconsin disciplinary matter a referee:

> ...concluded that Mr. Heilgeist's conduct in the matter [representing Wetzel in his personal injury claim] did not constitute a practice of law in Wisconsin and, therefore, did not violate either [Supreme Court of Wisconsin] Rule 22.26(2), which prohibits a suspended lawyer from practicing law, or SCR 20.18(2) proscribing the unauthorized practice of law. (App. I, p. 3).

The Wisconsin Supreme Court, however, adopted another finding of the Hearing Referee to the effect that, "Mr. Heilgeist purported to be authorized and qualified to practice law in Wisconsin," because the letter which petitioner wrote to the Wisconsin high school principal purportedly threatened a lawsuit if petitioner "did not hear from the school or its

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*cont'd/ --In 1985 the Wisconsin Supreme Court suspended petitioner as "reciprocal discipline" to that imposed on him by the Illinois Supreme Court on a complaint arising from his Illinois practice.

--Petitioner allegedly did not comply with the Wisconsin 1985 reciprocal suspension order by refusing to pay the costs of the Wisconsin proceeding and to file an affidavit concerning his post-suspension activities.

insurance carrier within a reasonable time". (id).

The Hearing Referee inferred that petitioner's letter was a representation to the Wisconsin principal that Heilgeist was authorized and qualified to commence the threatened action in Wisconsin and noted that the letterhead stationery of petitioner still used his previous Wisconsin law office address and telephone number. (id)

The Wisconsin Supreme Court adopted all of the Referee's findings of fact and conclusions of law and accepted the recommendation of a six-month suspension of petitioner's license to practice law in Wisconsin for "unprofessional conduct". The Wisconsin high court noted its prior disciplinary actions against petitioner and ordered that the new six-month suspension:

> ...should not commence until Mr. Heilgeist has complied with prior suspension orders. Because the six-month suspension we impose in this pro ceeding does not have at this time an ascertainable commencement date [sic] we impose a suspension for an indefinite period, subject to further order of the court.

On July 2, 1987 petitioner filed a motion with the Supreme Court of Wisconsin requesting reconsideration of its June 2, 1987 decision. Because petitioner's motion was not filed within 20 days of the decision of the court (which had not been received by petitioner on the day its filing) the motion for reconsideration was dismissed as "not timely filed". (App. II).

Because of the action of the Wisconsin Supreme Court in suspending petitioner, he faces reciprocal discipline by the Supreme Court of Illinois pursuant to Supreme Court Rule 763 which in pertinent part provides:

> If an attorney,licensed to practice law in this state and another state, is disciplined in the foreign state, he may be subjected to the same discipline in this state, to run concurrently with the discipline in the foreign state, upon proof of the order of the foreign state imposing the discipline.

## A R G U M E N T

THE DISCIPLINARY ACTION OF THE SUPREME COURT OF WISCONSIN INFRINGES UPON PETITIONER'S

FUNDAMENTAL RIGHT" TO PRACTICE LAW IN HIS NATIVE STATE AND CONTRAVENES THE "PRIVILEGES AND IMMUNITIES" CLAUSES OF ART. IV, SEC. 2 AND AMEND. XIV, SEC. 1 OF THE CONSTITUTION.

The action of the Supreme Court of Wisconsin in suspending the petitioner indefinitely from practicing law in that state--even though the offense charged against him was not the practice of law in Wisconsin--has the automatic consequence of a suspension to practice in Illinois. Even though petitioner has not in fact practiced in Wisconsin since 1982 and his representation of Wetzel admittedly was not the unauthorized practice of law in Wisconsin, the decision of the Wisconsin Supreme Court is an infringement on Heilgeist's fundamental right to practice his profession and earn his livelihood in his own state.

In Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 84 L. Eds. 2d 205, 106 S. Ct. (1985), the court in analyzing

the scope of Art. IV, Sec. 2 and citing Ward v. Maryland, 12 Wall 418, 20 L. Ed. 449 (1871), Toomer v. Witsell, 334 U.S. 385, 92 L. Ed. 1460, 68 S.Ct. 1156 (1948) and Hicklin v. Orbeck, 437 U.S. 518, 57 L. Ed. 2d 397, 98 S. Ct. 2482 (1978), ruled that the practice of law was a protectable privilege under that Article. The court said:

> There is nothing in Ward, Toomer, or Hicklin, suggesting that the practice of law should not be viewed as a 'privilege' under Article IV, §2. Like the occupations considered in our earlier cases, the practice of law is important to the national economy. As the court noted in Goldfarb, the 'activities of lawyers play an important part in commercial intercourse'. Goldfarb v. Virgina State Bar, 421 U.S. 773, 788, 44 L. Ed. 2d 572, 95 S. Ct. 2004 (470 U.S. at 471).

In Piper, the court observed that:

> The lawyer's role in the national economy is not the only reason that the opportunity to practice law should be considered a 'fundamental right'. We believe that the legal profession has a non-commercial role and duty that reinforce the view that the practice of law falls within the ambit of the Privileges and Immunities Clause. (id)

In Piper, the court noted that out-

of-state or non-resident lawyers may perform valuable services where local counsel may not wish to be involved (viz. the nature of Wetzel's claim against his local high school).

In Piper, a resident of Vermont was allowed to take and passed the New Hampshire bar examination. A rule of the New Hampshire Supreme Court limited bar admission to state residents. The Supreme Court denied appellee's request that an exception to the rule be made in her case because she intended to become a New Hampshire resident. This Court struck down the application of the New Hampshire rule as a violaton of the Privileges and Immunities clauses of Art. IV, sec. 2. The Court struck down the contention of the New Hampshire State Supreme Court that the Privileges and Immunities Clause would be inapplicable to the practice of law, because a lawyer's activities are "'bound up with the exercise of judicial power and the

administration of justice'". (470 U.S. at 282).

Striking down several other justifications for New Hampshire's purported exclusion of the Vermont resident from the practice of law in New Hampshire, this Court, said:

> In summary, the State neither advances a 'substantial reason' for its discrimination against non-resident applicants to the bar, nor demonstrates that the discrimination practice bears a close relationship to its proffered objective. (470 U.S. at 287 ).

In Piper, the condemned discrimination was the exclusion of a Vermont resident from practicing law in New Hampshire, and limit the availability of New Hampshire residents only to lawyers resident in that state. The case at bar represents an obverse form of discrimination in that petitioner is being disciplined, extraterritorially from practicing in Wisconsin so that his legal services in Illinois could not be available to a Wisconsin resident, whose representation did not necessarily require a Wisconsin lawyer.

In these circumstances, the Wisconsin disciplinary action is nothing but a transparent effort to prevent or discourage Wisconsin residents from engaging an Illinois lawyer, if they wished, to perform legal services which would not necessarily involve the practice of law in Wisconsin.

The issue presented by the case at bar is not an interference with the ability of Wisconsin to regulate the practice of law within its own state. The imposition of its disciplinary rules upon petitioner, however, and his voluntary removal from Wisconsin practice since 1982 offends his Illinois privilege of practicing law and his immunity from Wisconsin discipline.*

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*/ Anthony Wetzel, consulting petitioner in his Illinois law office with the understanding that petitioner's services would be performed as an Illinois lawyer requiring Wisconsin counsel only if litigation was necessary in that state, was also protected by the Privileges and Immunities Claus. See: Doe v. Bolton, 410 U.S. 179 (1973) where the Court said at p. 200:

While agreeing with the Referee that Heilgeist's conduct in handling the Wetzel matter "did not constitute the practice of law in Wisconsin" (App. I, 3), the Court inexplicably accepts the finding that Heilgeist's letter to the Wisconsin principal somehow "implied that Mr. Heilgeist was authorized and qualified to commence the threatened action in Wisconsin". (id). Apparently the basis for this supposition was that Mr. Heilgeist's letterhead showing his Illinois law office also showed a Wisconsin address--(which was Mr. Heilgeist's residence and home

* cont'd/

> ...as the Privileges and Immunities Clause protects persons who enter that state to ply their trade...so must it protect persons who enter Georgia seeking medical services that are available there."

And though the court also upheld the right of physicians subject to criminal prosecution for acts in treating their patients have standing to assert rights of those patients. (410 U.S. at 188-189) See also: Planned Parenthood v. Danforth, 428 U.S. 52, 62 (1976); Craig v. Boren, 429 U.S. 190, 192-197 (1976) and Carey v. Population Services Int., 431 U.S. 678, 682-684 (1977) recognizing the right of vendors of certain services with sufficient injury to their own interests, to assert the rights of their customers.

telephone number). On such tenuous basis did the Supreme Court of Wisconsin see fit to enter its judgment of "indefinite suspension".*

## C O N C L U S I O N

For all of the foregoing reasons petitioner prays that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

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*Counsel of Record*

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*/ In view of petitioner's voluntary removal from practice from Wisconsin in 1982, the only proper action which the Wisconsin authorities could have lodged against petitioner is a claim of "unauthorized practice" which would have entailed different proceeding and a different finding. The instant judgment imposes "discipline for unprofessional conduct", on the erroneous assumption of the Wisconsin court that Heilgeist was still a member of the Wisconsin bar.

F I L E D
Jun 02 1987

Marilyn L. Graves
Clerk of the Supreme Court
Madison, Wisconsin

Case No. 85-2014-D

STATE OF WISCONSIN: IN SUPREME COURT

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In the Matter of Disciplinary Proceedings

Against ROBERT J. HEILGEIST, Attorney at Law

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PER CURIAM

Attorney disciplinary proceedings; attorney's license suspended.

The referee recommended that the license of Robert J. Heilgeist to practice law in Wisconsin be suspended for six months as discipline for unprofessional conduct. Because Mr. Heilgeist has been suspended from membership in the State Bar since 1984 for failing to satisfy continuing legal education requirements and has also failed to comply with the court's 1985 order imposing a 90-day suspension of his license for unprofessional conduct, the referee recommended that the six-month suspension as discipline in this proceeding not commence until Mr. Heilgeist has been reinstated to State Bar membership

and has complied with the court's prior suspension order. The misconduct for which the referee in this proceeding recommended a six-month suspension of Mr. Heilgeist's license consisted of his having purported to be authorized and qualified to practice law in Wisconsin, knowing that his license was suspended. In addition, Mr. Heilgeist failed to comply with the court's order requiring him to pay the costs of the prior disciplinary proceeding.

We determine that a six-month suspension of Mr. Heilgeist's license to practice law in Wisconsin is appropriate discipline for his unprofessional conduct in these matters, particularly in light of previous misconduct for which he was disciplined. Mr. Heilgeist has repeatedly demonstrated his refusal to comply with the court's rules governing the ethical conduct of attorneys and to conform to the rules and orders of the court with respect to lawyer competence and discipline.

Mr. Heilgeist was licensed to practice law in Wisconsin in 1979 and practices in Illinois and, prior to his license suspension, in Twin Lakes, Wisconsin. In 1983 the court publicly reprimanded him for having commenced a meritless libel and malpractice action against another attorney. In 1984 he was suspended from membership in the State Bar for failing to satisfy the continuing legal education requirement for attorneys and he remains suspended. The court again disciplined him in 1985, imposing a 90-day suspension as reciprocal discipline to that imposed by the Illinois attorney disciplinary authorities for his having participated in the creation of false evidence. Mr. Heilgeist did not comply with the 1985 suspension order by failing to pay the costs of that proceeding and failing to file the affidavit required by SCR 22.26(4) concerning his activities upon the suspension of his license. The referee in this proceeding is Attorney William Bunk.

Following a hearing, the referee found that in April, 1985 a Wisconsin resident retained Mr. Heilgeist to represent him in an injury received at a high school in this state. The man went to Mr. Heilgeist's law office in Illinois, met with his secretary and signed a retainer contract. Thereafter, the client met Mr. Heilgeist at the office and Mr. Heilgeist informed him that any litigation in Wisconsin would be handled by a Wisconsin lawyer. Subsequently, Mr. Heilgeist wrote to the high school concerning the accident and enclosed a notice of lien, which set forth that it had been obtained under Illinois law. The referee found no evidence, however, that Mr. Heilgeist acted in this legal matter while in Wisconsin.

The referee concluded that Mr. Heilgeist's conduct in the matter did not constitute the practice of law in Wisconsin and, therefore, did not violate either SCR 22.26(2), which prohibits a suspended attorney from practicing law, or SCR 20.18(2) proscribing the unauthor-

ized practice of law. However, the referee did conclude that Mr. Heilgeist purported to be authorized and qualified to practice law in Wisconsin, in violation of SCR 10.03(4). In his letter to the highschool, Mr. Heilgeist wrote that if he did not hear from the school or its insurer within a reasonable time, his next notice to them would be a lawsuit. This, the referee concluded, implied that Mr. Heilgeist was authorized and qualified to commence the threatened action in Wisconsin. In addition, the letterhead stationery Mr. Heilgeist used included a Wisconsin law office address and telephone number.

The referee also concluded that Mr. Heilgeist failed to comply with the requirement that an attorney whose license to practice law has been suspended file an affidavit within 25 days after the effective date of the suspension order, SCR 22.26(4). Further, Mr. Heilgeist failed to comply with the court's 1985 suspension order requiring him to pay the costs

of that disciplinary proceeding within a specified time, absent a showing of an inability to pay those costs.

We adopt the referee's findings of fact and conclusions of law, and we agree that a six-month suspension of his license to practice law in Wisconsin is appropriate discipline for his unprofessional conduct. We also agree that the six-month suspension should not commence until Mr. Heilgeist has complied with prior suspension orders. Because the six-month suspension we impose in this proceeding does not have at this time an ascertainable commencement date, we impose a suspension for an indefinite period, subject to further order of the court.

IT IS ORDERED that the license of Robert J. Heilgeist to practice law in Wisconsin is suspended, effective the date of this order and until further order of the court.

IT IS FURTHER ORDERED that within 120 days of the date of this order Robert J. Heilgeist pay to the Board of Attorneys Professional

Responsibility the costs of this disciplinary proceeding, provided that if the costs are not paid within the time specified and absent a showing of his inability to pay the costs within the time specified, the license of Robert J. Heilgeist to practice law in Wisconsin shall be suspended until further order of the court.

IT IS FURTHER ORDERED that Robert J. Heilgeist comply with the provisions of SCR 22-26 concerning the duties of a person whose license to practice law in Wisconsin has been suspended.

Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN

Madison, July 29, 1987

To Robert J. Heilgiest Attorney James Winiarski
1317 Cedar Lake Road 3625 W. Oklahoma Avenue
Lake Villa, IL 60046 Milwaukee, WI 53215

Board of Attorneys Professional
Responsibility

The Court today announced an order in your case as follows:

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In the Matter of Disciplinary Proceedings Against Robert J. Heilgeist Case No. 85-2014-D

On July 2, 1987 Robert Heilgeist filed a motion for reconsideration of the court's June 2, 1987 decision suspending his license to practice law in Wisconsin for misconduct. Section (Rule) 809.64, Stats., provides that a party may seek reconsideration of the judgment or opinion of the court by filing a motion for reconsideration within 20 days of the filing of the decision of the court. Mr. Heilgeist's motion was not timely filed.

IT IS ORDERED that the motion for reconsideration is dismissed.

Abrahamson and Bablitch, JJ., did not participate.

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MARILYN L. GRAVES
Clerk of Supreme Court